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San Diego Bike & Kayak Tours, Inc.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

SAN DIEGO BIKE & KAYAK TOURS, INC., a California corporation, Plaintiff, v. LA JOLLA KAYAK & COMPANY, LLC, a limited liability company, LA JOLLA KAYAK, LLC, a California corporation; MICHAEL LUSCOMB, an individual; SHARON LUSCOMB, an individual, Defendants. AND RELATED COUNTER-CLAIM	CASE NO.: 07-CV-2173 L(CAB) **ANSWER OF SAN DIEGO BIKE & KAYAK TOURS INC. TO COUNTER-CLAIM** **JURY TRIAL DEMANDED**

ANSWER TO COUNTER-CLAIM

Plaintiff and Counter-Defendant San Diego Bike & Kayak Tours, Inc. ("SDB&KT") hereby answers Counter-Claimants' counter-claims as follows:

1. In response to paragraph 1, SDB&KT lacks sufficient information or knowledge to either admit or deny the allegations of this paragraph, and therefore denies them on that basis.

2. In response to paragraph 2, SDB&KT lacks sufficient information or knowledge to either admit or deny the allegations of this paragraph, and therefore denies them on that basis.

3. In response to paragraph 3, SDB&KT admits the allegations of this paragraph.

4. In response to paragraph 4, SDB&KT admits that Counter-Defendant Marcella DiMichieli is an individual residing in the County of San Diego, in the State of California. SDB&KT admits that Defendant Marcella Di Michieli did business under the name San Diego Bike & Kayak Tours from April 2004 to March 2006. Except as specifically admitted, SDB&KT denies the allegations of this paragraph.

5. In response to paragraph 5, SDB&KT admits that Counter-Defendant Nicholas Bauman is an individual residing in the county of San Diego, in the State of California. SDB&KT admits that Counter-Defendant Nicholas Bauman is a shareholder of Counter-Defendant San Diego Bike & Kayak Tours, Inc. Except as specifically admitted, SDB&KT denies the allegations of this paragraph.

6. In response to paragraph 6, SDB&KT lacks sufficient information or knowledge to either admit or deny the allegations of this paragraph, and therefore denies them on that basis.

7. In response to paragraph 7, SDB&KT admits that the Counter-Claim purports to state a counter-claim for damages and injunctive relief under the Lanham Act, and for unfair competition, but denies that Counter-Claimants are entitled to any such relief and denies any remaining allegations of this paragraph.

8. In response to paragraph 8, SDB&KT admits that this Court has original subject matter jurisdiction over the counter-claims asserted against it. Except as specifically admitted, SDB&KT denies the allegations of this paragraph.

9. In response to paragraph 9, SDB&KT admits that this Court has personal jurisdiction over SDB&KT, and Counter-Defendants Marcella Di Michieli and Nicholas Bauman. Except as specifically admitted, SDB&KT denies the allegations of this paragraph.

10. In response to paragraph 10, SDB&KT admits that venue is proper in this district. Except as specifically admitted, SDB&KT denies the allegations of this paragraph.

11. In response to paragraph 11, SDB&KT admits that La Jolla Kayak & Co., LLC ("LJK") is located in La Jolla and provides kayak and snorkeling rentals and tours in La Jolla, including La Jolla Shores, La Jolla Cove, and the La Jolla caves. SDB&KT lacks sufficient information or knowledge to either admit or deny the allegation that LJK has provided kayak tours in La Jolla since January 1, 1995, and therefore denies this allegation on that basis. Except as specifically admitted, SDB&KT denies the allegations of this paragraph.

12. In response to paragraph 12, SDB&KT states that Trademark Registration Number 3297782 speaks for itself. SDB&KT admits that Exhibit 1 to the counter-claims appears to be a print-out of Registration Number 3297782 from the United States Patent and Trademark Office TESS system. Except as specifically admitted, SDB&KT denies the allegations of this paragraph.

13. In response to paragraph 13, SDB&KT lacks sufficient information or knowledge to admit or deny the allegation that "Counter-Claimants have devoted substantial time, effort and resources to the development and promotion throughout San Diego County and other parts of California of the trade name 'LA JOLLA KAYAK," and service mark and services sold under said trade name and mark," and therefore denies this allegation on that basis. SDB&KT denies the remaining allegations of this paragraph.

14. In response to paragraph 14, SDB&KT admits that LJK and SDB&KT offer competing services. SDB&KT admits that Exhibit 2 to the counter-claims is a print-out from SDB&KT's website as of April 3, 2008 and states that it speaks for itself. Except as specifically admitted, SDB&KT denies the allegations of this paragraph.

15. In response to paragraph 15, SDB&KT admits that it has used the phrases "La Jolla kayaks," "La Jolla kayak rentals," "La Jolla kayaking," "kayaking in La Jolla," "kayak in La Jolla," "La Jolla kayak tours" to describe the fact that SDB&KT offers kayak rentals and kayak

tours in and around the La Jolla. SDB&KT admits that San Diego Bike & Kayak Tours previously used with LJK's express permission a picture of Michael Luscomb kayaking on one of its web pages. Except as specifically admitted, SDB&KT denies the allegations of this paragraph.

16. In response to paragraph 16, SDB&KT admits that Exhibit 4 to the counter-claim is a copy of SDB&KT's rack-card. SDB&KT lacks sufficient information or knowledge to either admit or deny the allegation that Exhibit 3 to the counter-claims is "Counter-Claimants' 'Rack Card,'" and therefore denies this allegation on that basis. Except as specifically admitted, SDB&KT denies the allegations of this paragraph.

17. In response to paragraph 17, SDB&KT admits that Counter-Claimants have no control over SDB&KT's services. Except as specifically admitted, SDB&KT denies the allegations of this paragraph.

18. In response to paragraph 18, SDB&KT admits that LJK and SDB&KT offer competing services. SDB&KT admits that LJK asked SDB&KT to cease and desist from using the words "La Jolla" and "kayak" in advertising its services. Except as specifically admitted, SDB&KT denies the allegations of this paragraph.

ANSWER TO FIRST CAUSE OF ACTION

19. In response to paragraph 19, SDB&KT incorporates its responses to paragraphs 1-18 above.

20. In response to paragraph 20, SDB&KT denies the allegations of this paragraph.

21. In response to paragraph 21, SDB&KT denies the allegations of this paragraph.

22. In response to paragraph 22, SDB&KT denies the allegations of this paragraph.

23. In response to paragraph 23, SDB&KT denies the allegations of this paragraph.

ANSWER TO SECOND CAUSE OF ACTION

24. In response to paragraph 24, SDB&KT incorporates its responses to paragraphs 1-23 above.

25. In response to paragraph 25, SDB&KT denies the allegations of this paragraph.

26. In response to paragraph 26, SDB&KT denies the allegations of this paragraph.

27. In response to paragraph 27, SDB&KT denies the allegations of this paragraph.

28. In response to paragraph 28, SDB&KT denies the allegations of this paragraph.

29. In response to paragraph 29, SDB&KT denies the allegations of this paragraph.

ANSWER TO THIRD CAUSE OF ACTION

30. In response to paragraph 30, SDB&KT incorporates its responses to paragraphs 1-30 above.

31. In response to paragraph 31, SDB&KT denies the allegations of this paragraph.

32. In response to paragraph 32, SDB&KT denies the allegations of this paragraph.

33. In response to paragraph 33, SDB&KT denies the allegations of this paragraph.

34. In response to paragraph 34, SDB&KT denies the allegations of this paragraph.

35. In response to paragraph 35, SDB&KT denies the allegations of this paragraph.

36. In response to paragraph 36, SDB&KT denies the allegations of this paragraph.

ANSWER TO FOURTH CAUSE OF ACTION

37. In response to paragraph 37, SDB&KT incorporates its responses to paragraphs 1-36 above.

38. In response to paragraph 38, SDB&KT lacks sufficient information or knowledge to either admit or deny the allegation that Counter-Claimants have used "LA JOLLA KAYAK" "continuously in commerce since January 1, 1995," and therefore denies this on that basis. SDB&KT denies the remaining allegations of this paragraph.

39. In response to paragraph 39, SDB&KT denies the allegations of this paragraph.

40. In response to paragraph 40, SDB&KT denies the allegations of this paragraph.

41. In response to paragraph 41, SDB&KT denies the allegations of this paragraph.

42. In response to paragraph 42, SDB&KT admits that LJK has asserted exclusive rights in the name "La Jolla Kayak" and has asked SDB&KT to cease and desist from using the words "La Jolla" and "kayak" in advertising its services. Except as specifically admitted, SDB&KT denies the allegations of this paragraph.

43. In response to paragraph 43, SDB&KT denies the allegations of this paragraph.

44. In response to paragraph 44, SDB&KT denies the allegations of this paragraph.

45. In response to paragraph 45, SDB&KT denies the allegations of this paragraph.

ANSWER TO FIFTH CAUSE OF ACTION

46. In response to paragraph 46, SDB&KT incorporates its responses to paragraphs 1-45 above.

47. In response to paragraph 47, SDB&KT lacks sufficient information or knowledge to either admit or deny the allegation that "Counter-Claimants have not yet filed an application for registration of said mark in the State of California covering the use of said mark for services," and therefore denies this on that basis. Except as specifically admitted, SDB&KT denies the allegations of this paragraph.

48. In response to paragraph 48, SDB&KT denies the allegations of this paragraph.

49. In response to paragraph 49, SDB&KT admits that LJK has asserted exclusive rights in the name "La Jolla Kayak" and has asked SDB&KT to cease and desist from using the words "La Jolla" and "kayak" in advertising its services. Except as specifically admitted, SDB&KT denies the allegations of this paragraph.

50. In response to paragraph 50, SDB&KT denies the allegations of this paragraph.

51. In response to paragraph 51, SDB&KT denies the allegations of this paragraph.

52. In response to paragraph 52, SDB&KT denies the allegations of this paragraph.

ANSWER TO SIXTH CAUSE OF ACTION

53. In response to paragraph 53, SDB&KT incorporates its responses to paragraphs 1-52 above.

54. In response to paragraph 54, SDB&KT denies the allegations of this paragraph.

55. In response to paragraph 55, SDB&KT denies the allegations of this paragraph.

56. In response to paragraph 56, SDB&KT denies the allegations of this paragraph.

ANSWER TO SEVENTH CAUSE OF ACTION

57. In response to paragraph 57, SDB&KT incorporates its responses to paragraphs 1-56 above.

58. In response to paragraph 58, SDB&KT denies the allegations of this paragraph.

59. In response to paragraph 59, SDB&KT denies the allegations of this paragraph.

60. In response to paragraph 60, SDB&KT denies the allegations of this paragraph.

ANSWER TO THIRTEENTH CAUSE OF ACTION

90. In response to paragraph 90, SDB&KT incorporates its responses to paragraphs 1-60 above.

91. In response to paragraph 91, SDB&KT admits that there is a controversy between the parties but denies that Counter-Claimants have any legal rights to "LA JOLLA KAYAK" as a trade name or any legal rights to variations thereof, including "LA JOLLA KAYAKS," "LA JOLLA KAYAK RENTAL," "LA JOLLA KAYAKING," "LA JOLLA KAYAK TOURS," "KAYAKING LA JOLLA," and denies the allegation that SDB&KT has used the mark in Registration No. 3297782. SDB&KT denies any remaining allegations of this paragraph.

92. In response to paragraph 92, SDB&KT states that it denies that any of Counter-Claimants stated contentions are true. SDB&KT denies any remaining allegations of this paragraph.

93. In response to paragraph 93, SDB&KT states that SDB&KT's contentions in the Complaint speak for themselves.

94. In response to paragraph 94, SDB&KT denies that Counter-Claimants have any legal rights to "LA JOLLA KAYAK" as a trade name or any legal rights to variations thereof, including "LA JOLLA KAYAKS," "LA JOLLA KAYAK RENTAL," "LA JOLLA KAYAKING," "LA JOLLA KAYAK TOURS," "KAYAKING LA JOLLA," and denies the allegation that SDB&KT has used the mark in Registration No. 3297782. SDB&KT denies any remaining allegations of this paragraph.

AFFIRMATIVE DEFENSES

As further answer and as affirmative defense, SDB&KT allege the following:

First Affirmative Defense

(Lack of Distinctiveness)

1. Counter-Claimants' trademark counter-claims are barred because the claimed marks lack distinctiveness.

Second Affirmative Defense

(Lack of Secondary Meaning)

2. Counter-Claimants' trademark counter-claims are barred because the claimed marks have not acquired secondary meaning.

Third Affirmative Defense

(Accord & Satisfaction)

3. Counter-Claimants' counter-claims are barred by the doctrine of accord and satisfaction.

Fourth Affirmative Defense

(Release)

4. Counter-Claimants' counter-claims are barred by the doctrine of release.

Fifth Affirmative Defense

(Statute of Limitations)

5. Counter-Claimants' counter-claims are barred by the applicable statute of limitations.

Sixth Affirmative Defense

(Federal Preemption)

6. Counter-Claimants' counter-claims are preempted by Federal Law and are thus barred.

Seventh Affirmative Defense

(Estoppel)

7. Counter-Claimants' counter-claims are barred by the doctrine of estoppel.

Eighth Affirmative Defense

(Acquiescence)

8. Counter-Claimants' counter-claims are barred by the doctrine of acquiescence.

Ninth Affirmative Defense

(Laches)

9. Counter-Claimants' counter-claims are barred by the doctrine of laches.

Tenth Affirmative Defense

(Unclean Hands)

10. Counter-Claimants' counter-claims are barred by the doctrine of unclean hands.

Eleventh Affirmative Defense

(Waiver)

11. Counter-Claimants' counter-claims are barred by the doctrine of waiver.

Twelfth Affirmative Defense

(Implied License)

12. Counter-Claimants' counter-claims are barred by the doctrine of implied license.

Thirteenth Affirmative Defense

(Consent)

13. Counter-Claimants' counter-claims are barred by the doctrine of consent.

Fourteenth Affirmative Defense

(Failure to State a Claim)

14. Counter-Claimants' counter-claims fail to state facts sufficient to state a claim for relief.

Fifteenth Affirmative Defense

(Fair Use)

15. Counter-Claimants' trademark counter-claims are barred because SDB&KT's alleged actions constitute fair use.

Sixteenth Affirmative Defense

(Failure to Mitigate Damages)

16. Counter-Claimants' have has failed to mitigate their damages, if any.

RELIEF REQUESTED

(a) A judgment in favor of SDB&KT denying Counter-Claimants all relief requested in their Counter-Claim in this action and dismissing Counter-Claimants' Counter-Claim with prejudice;

(b) That SDB&KT be awarded its costs of suit, including reasonable attorneys' fees, and;

(c) That the Court award SDB&KT such other and further relief as the Court deems just and proper.

DEMAND FOR JURY TRIAL

In accordance with Federal Rule of Civil Procedure 38(b), SDB&KT demands a trial by jury on all issues so triable.

Dated: May 9, 2008

Respectfully Submitted,

THE TAYLER LAW FIRM, P.C.

By __________/s/____________________

William C. Tayler
Attorney for Cross-Defendant
San Diego Bike & Kayak Tours, Inc.